

Statement of
Philip A. Miscimarra
Senior Fellow, The Wharton School, University Of Pennsylvania
Partner, Morgan Lewis & Bockius LLP
before the
Subcommittee on Health, Employment, Labor and Pensions
Committee on Education and the Workforce
United States House of Representatives
February 11, 2011

Outer Limits at the NLRB:
Legislative Choices in the National Labor Relations Act

Chairman Roe, Ranking Member Andrews, and Subcommittee Members, thank you for your invitation to participate in this hearing. I am honored to appear before you today.

By way of introduction, I am a Senior Fellow at the University of Pennsylvania's Wharton School and for more than 30 years I have been associated with the Wharton Center for Human Resources (previously known as the Wharton Industrial Research Unit). The majority of my academic work has dealt with the National Labor Relations Act and the National Labor Relations Board. I am also a Partner in the law firm of Morgan Lewis & Bockius LLP, and I have been a labor lawyer in private practice representing management since 1982.¹

Summary – Labor Policy and Running the Race

The National Labor Relations Act (NLRA or Act)² was adopted when there was a national economy, and the Act still centers around a bargaining model where each side's leverage largely stems from economic damage it may inflict on the other party.³

In a global economy, this places unions and companies in a relay race, and all too often in the United States, the union's incentive is to use the baton to injure or maim the employer, instead of running the race against international competitors. Companies and employees suffer greatly from this type of conflict, especially small businesses. Expanding the Act's coverage and making the weapons more destructive – without direction to do so from Congress – runs counter to the NLRA's primary objective, which is to foster economic stability.

¹ My testimony today reflects my own views which should not be attributed to The Wharton School, the University of Pennsylvania, or Morgan Lewis & Bockius. I am grateful to Ross H. Friedman and Rita Srivastava for assistance.

² 49 Stat. 449 (1935), 29 U.S.C. §§ 151 *et seq.*

³ See *NLRB v. Insur. Agents' Int'l Union*, 361 U.S. 477, 489 (1960), where the Supreme Court referred to the bargaining contemplated by the Act, and observed that the parties "proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest. . . . The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized."

Legislative Choices in the NLRA

Decision-making concerning the scope of our federal labor laws has long been the province of Congress. The NLRA,⁴ originally known as the Wagner Act, was adopted in 1935 after 18 months of work by the House and Senate. Important NLRA amendments were adopted in 1947 as part of the Labor Management Relations Act (the Taft-Hartley Act).⁵ The Act was also substantially amended in 1959 as part of the Labor Management Reporting and Disclosure Act (the Landrum-Griffin Act).⁶ And in 1974 the Act was amended based on the Health Care Amendments to the National Labor Relations Act.⁷

Perhaps to state the obvious (especially for this Subcommittee's Members), substantial debate, deliberation and controversy preceded every instance when the Act and proposed amendments were adopted by Congress, and also when they were not.⁸

The NLRA incorporates many policy decisions made by Congress. I will mention four in particular.

1. Balancing of Interests. First, the Act reflects fundamental choices by Congress in the balancing of interests between employers, unions, employees, and the public.⁹ By comparison, the Supreme Court has stated the National Labor Relations Board (NLRB or Board) is *not* vested with "general authority to define national labor policy by balancing the competing interests of labor and management."¹⁰

2. Impact on the Economy. Second, the Act has always been closely associated with national economic policy. The Act was created during the Great Depression, and it was

⁴ 49 Stat. 449 (1935), 29 U.S.C. §§ 151 *et seq.*

⁵ 61 Stat. 136 (1947), 29 U.S.C. §§ 141 *et seq.*

⁶ 73 Stat. 541 (1959), 29 U.S.C. §§ 401 *et seq.*

⁷ 88 Stat. 395 (1974).

⁸ For example, the Employee Free Choice Act (EFCA) introduced during the 111th Congress would have substantially changed the NLRA's treatment of representation elections, the bargaining of initial contracts, and damages available under the Act, but was not adopted. See S. 560, 111th Cong., 1st Sess. (2009); H.R. 1409, 111th Cong., 1st Sess. (2009). The failure to adopt proposed amendments is sometimes regarded as validating prior interpretations of the Act. See *NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 275 (1974) ("congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress").

⁹ The Act's central provision dealing with protected rights is Section 7, 29 U.S.C. § 157, which protects the right of employees "to bargain collectively through representatives of their own choosing . . . and to refrain from any or all of such activities," except as affected by union security agreements in states that do not prohibit such agreements. Cf. NLRA § 14(b), 29 U.S.C. § 164(b) (permitting state right-to-work laws prohibiting union security agreements).

¹⁰ *American Ship Building Co. v. NLRB*, 380 U.S. 300, 316 (1965). The Supreme Court has held that, concerning "a judgment as to the proper balance to be struck between conflicting interests, 'the deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress.'" *NLRB v. Brown*, 380 U.S. 278, 291-92 (1965) ("Reviewing courts are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute").

adopted to permit collective bargaining for the overriding purpose of eliminating burdens and obstructions on commerce.¹¹

3. *Stability*. Third, a “basic policy of the Act [is] to achieve stability of labor relations.”¹² Concerning Section 8(a)(3), the Supreme Court has stated: “To achieve stability of labor relations was the primary objective of Congress in enacting the National Labor Relations Act. . . . It is not necessary for us to justify the policy of Congress. It is enough that we find it in the statute.”¹³ Concerning Section 8(a)(5), the Supreme Court has held management “must have some degree of certainty beforehand . . . without fear of later evaluations labeling its conduct an unfair labor practice.”¹⁴

The quest for labor relations stability is complicated by changes in direction coinciding with differences in the Board’s composition. Arguments for stability and change at the NLRB are not new.¹⁵ However, reducing abrupt changes in position should be a non-partisan

¹¹ NLRA § 1, 29 U.S.C. § 151 (establishing policy “to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate those obstructions”). See also *First Nat’l Maint. Corp. v. NLRB*, 452 U.S. 666, 674 (1981), citing *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 42 (1937) (“A fundamental aim of the National Labor Relations Act is the establishment and maintenance of industrial peace to preserve the flow of interstate commerce”); *Fibreboard Paper Prod. Corp. v. NLRB*, 379 U.S. 203, 211 (1964) (“One of the primary purposes of the Act is to promote the peaceful settlement of industrial disputes by subjecting labor-management controversies to the mediatory influence of negotiation”); *Local 24, Int’l Bhd. of Teamsters v. Oliver*, 358 U.S. 283, 295 (1959) (“The goal of federal labor policy, as expressed in the Wagner and Taft-Hartley Acts, is the promotion of collective bargaining . . . and thereby to minimize industrial strife”).

In many contexts, protected NLRA rights also give way if they cause substantial economic harm or implicate fundamental business considerations. See *Fibreboard*, *supra* note 11, 379 U.S. at 223 (Justice Stewart, concurring) (bargaining is not mandatory over decisions “fundamental to the basic direction of a corporate enterprise,” which “lie at the core of entrepreneurial control” or which concern “the commitment of investment capital”); *First Nat’l Maint.*, *supra* note 11, 452 U.S. at 674, 676-78 (“Congress had no expectation that the elected union representative would become an equal partner in the running of the business enterprise in which the union’s members are employed. . . . Management must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business”); *NLRB v. Retail Store Employees Union (Safeco Title Insur. Co.)*, 447 U.S. 607 (1980) (consumer-directed struck product picketing, generally permitted under NLRA § 8(b)(4)(B), is unlawful if it “reasonably can be expected to threaten neutral parties with ruin or substantial loss”); *Lear Siegler, Inc.*, 295 NLRB 857, 861 (1989) (NLRB’s *status quo ante* remedy not required where the outcome would be “unduly burdensome”); *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984) (rejection of collective bargaining agreements in bankruptcy); *NLRB v. Burns Sec. Serv.*, 406 U.S. 272, 287-88 (1972) (legal successors not required to adopt the predecessor’s labor contract because “[a] potential employer may be willing to take over a moribund business only if he can make changes in corporate structure, composition of the labor force, work location, task assignment, and nature of supervision”).

¹² *NLRB v. Appleton Elec. Co.*, 296 F.2d 202, 206 (7th Cir. 1961).

¹³ *Colgate-Palmolive-Peet Co. v. NLRB*, 338 U.S. 355, 362-63 (1949).

¹⁴ *First Nat’l Maint.*, *supra* note 11, 452 U.S. at 678-79.

¹⁵ Not much has changed since Professor Summers made the following observation about the NLRB more than 50 years ago: “The labor lawyer’s world is not a secure one, for [the lawyer] walks on a thin crust of precedents. The body of Board decisions in many areas often gives an appearance of firmness only to have tremors beneath the surface open unexpected fissures or raise new ranges of decisions. In our primitiveness we may see these faults and upheavals in the crust of precedents as acts of God or Satan, crediting angels or devils incarnate in the bodies of Board members. With the appointment of new members the warning rumblings become more noticeable, and we spur our efforts to seek out the spirits and identify them as good or evil.” C. Summers, *Politics, Policy Making, and the NLRB*, 6 Syracuse L. Rev. 93 (1955). No side has a monopoly on pleas for more stability and fewer changes at the Board. Such appeals have also been made at times when union proponents complain of changes by a Republican

objective – employers, unions and employees alike are disadvantaged by a proliferation of policy reversals at the Board.¹⁶

4. *Protection of Neutrals.* Fourth, another important policy decision by Congress involves the Act’s “secondary boycott” provisions which protect “neutral” parties from labor disputes.¹⁷ “Neutral” here means employers, employees, consumers and others who have no dispute with a union except they deal with a different company that is the target of union organizing, a union corporate campaign, or strike.¹⁸ In 1947 and again in 1959, Congress made major changes in the Act to protect “neutral” parties from union strikes, refusals to handle, threats, coercion and restraint directed against them merely because they deal with someone else with whom the union has a dispute.¹⁹

The Act’s secondary boycott provisions have become more important because of our economy’s dependence on more numerous, complex relationships between manufacturers, service providers, suppliers, vendors and contractors.²⁰ It is no secret that unions have also

majority. See, e.g., L. Bierman, *Reflections on the Problem of Labor Board Instability*, 62 Denv. U. L. Rev. 551 (1985); Cooke & Gautschi, *Political Bias in NLRB Unfair Labor Practice Decisions*, 35 Indus. & Lab. Rel. Rev. 539 (1982); Dunau, *The Role of Criticism in the Work of the National Labor Relations Board*, 16 N.Y.U. Conf. Lab. 205 (1963). Cf. Hickey, *Stare Decisis and the NLRB*, 17 Lab. L.J. 451 (1966).

¹⁶ The courts have especially been critical of NLRB changes in position that operate to the detriment of parties while litigation is pending. See, e.g., *Ryan Heating Co., Inc. v. NLRB*, 942 F.2d 1287, 1289 (8th Cir. 1991) (retroactive application of changed interpretation would be “manifestly unjust” and “essential demands of fairness” require that parties not be “subject to entrapment” merely because “the Board later departs from its earlier position”) (citation omitted); *Epilepsy Foundation of Northeast Ohio*, 268 F.3d 1095, 1099 (D.C. Cir. 2001), cert. denied, 536 U.S. 904 (2002) (“It is a fact of life in NLRB lore that certain substantive provisions of the NLRA invariably fluctuate with the changing compositions of the Board”; court denies retroactive enforcement of Board’s changed interpretation because “[e]mployees and employers alike must be able to rely on clear statements of the law by the NLRB”).

¹⁷ A secondary boycott has been described as an effort “to influence A by exerting some sort of economic or social pressure against persons who deal with A.” F. Frankfurter and N. Greene, *THE LABOR INJUNCTION* 43 (1930). The Act’s principal secondary boycott provisions include §§ 8(b)(4)(B) and 8(e), 29 U.S.C. §§ 158(b)(4)(b). Section 8(b)(4)(A), 29 U.S.C. § 158(b)(4)(A) makes it an unfair labor practice, in part, for a union to conduct a strike or use threats, coercion or restraint with the object of forcing an employer to enter into agreement prohibited by § 8(e). The term “boycott” can be misleading when discussing the Act’s secondary boycott provisions. The Act prohibits certain types of secondary union activity directed at neutrals (e.g., picketing), but permits other secondary activity (e.g., publicity other than picketing), even though both situations may involve advocating a boycott of the neutral. For this reason, as mentioned later, how the NLRB chooses to characterize particular types of union activity can dictate whether it is lawful or unlawful. See text accompanying notes 28-35, *infra*.

¹⁸ The courts have indicated: “The gravamen of a secondary boycott . . . is that its sanctions bear, not upon the employer who alone is a party to the dispute, but upon some third party who has no concern in it. Its aim is to compel him to stop business with the employer in the hope that this will induce the employer to give in to his employees’ demands.” *Bhd. of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 388 (1969) (citing *IBEW Local 501 v. NLRB*, 181 F.2d 34, 37 (1950), and *Nat’l Woodwork Mfr. Ass’n v. NLRB*, 386 U.S. 612, 623 (1967)).

¹⁹ In 1947, as part of the Taft-Hartley Act, Congress added NLRA § 8(b)(4), 29 U.S.C. §§ 158(b)(4). The Supreme Court in *NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 692 (1951), described this addition as reflecting “dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressure in controversies not their own.” In 1959, as part of the Landrum-Griffin Act, Congress made important changes in § 8(b)(4) and added NLRA § 8(e), 29 U.S.C. § 158(e).

²⁰ As I have written, “Numerically, the percentage of American employees represented by unions has steadily decreased, which might suggest unions would have less success in efforts to enmesh ‘neutrals’ in their

dramatically increased their reliance on third party pressure to promote top-down union organizing, neutrality agreements and corporate campaigns.²¹

Outer Limits on the NLRB's Authority

The NLRB is charged with the "difficult and delicate responsibility" of administering the Act.²² I have dealt with the Board for nearly 30 years. I respect the Members of the Board, its Acting General Counsel, and others who work in the agency.²³ The work of the NLRB is not easy, and it is often fraught with controversy.

At the same time, there are definite limits on the Board's authority. The Board is entitled to deference when it exercises its "informed judgment on matters within its special competence."²⁴ But the Supreme Court has held that, when courts review decisions of the

primary disputes. However, declining union membership has also prompted unions to exert more pressure on third parties in an effort to increase unionization among nonunion employers." P. Miscimarra, A. Berkowitz, M. Wiener & J. Ditelberg, *THE NLRB AND SECONDARY BOYCOTTS* at 16 (3d ed. 2002). The Bureau of Labor Statistics indicates that, in 2010, the union membership rate was 11.9 percent counting all employers, and 6.9 percent counting private sector employers. See U.S. Dep't of Labor Bureau of Labor Statistics, Economic News Release, Union Members Summary (2011), <http://www.bls.gov/news.release/union2.nr0.htm>. Concerning the increased reliance by unions on secondary pressure, see note 21, *infra*.

²¹ The AFL-CIO's Industrial Union Department has indicated a "coordinated corporate campaign applies pressure to many points of vulnerability to convince the company to deal fairly and equitably with the union," "[i]t means seeking vulnerabilities in all of the company's political and economic relationships – with other unions, shareholders, customers, creditors, and government agencies – to achieve union goals," and "the union is looking for ways in which it can use its resources to expand the dispute from the workplace to other arenas. . . ." Ind. Union Dept., AFL-CIO, *DEVELOPING NEW TACTICS: WINNING WITH COORDINATED CORPORATE CAMPAIGNS* at 1-3 (1985). To the same effect, see C. Estlund, *The Ossification Of American Labor Law*, 102 Columbia L. Rev. 1527 (2002), which refers to "alternative forms of economic pressure" and states: "These tactics target not only the 'primary' employer, who may often be relatively insulated from public pressure, but others who have ties to and leverage over the primary employer. The 'corporate campaign,' for example, seeks concessions from employers by targeting directors, customers, suppliers, lenders, and investors with publicity and other forms of pressure." "This aspect of the new strategies is potentially in conflict with the secondary boycott provisions of the NLRA." *Id.* at 1605 & n.326.

²² *NLRB v. Ins. Agents' Int'l Union*, 361 U.S. 477, 499 (1960), quoting *NLRB v. Truck Drivers Local 449*, 353 U.S. 87, 96 (1957). In *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963), the Court stated "we must recognize the Board's special function of applying the general provisions of the Act to the complexities of industrial life" (citation omitted). See also *NLRB v. Action Automotive, Inc.*, 469 U.S. 490, 496-97 (1985); *Ford Motor Co. v. NLRB*, 441 U.S. 488, 495 (1978); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941).

²³ I have written that the NLRB and the courts have an unenviable responsibility under the Act, which becomes even more daunting when variations in the law result from periodic changes in the Board's composition. Philip A. Miscimarra et al., *THE NLRB AND MANAGERIAL DISCRETION: SUBCONTRACTING, RELOCATIONS, CLOSINGS, SALES, LAYOFFS, AND TECHNOLOGICAL CHANGE* at 569 (2d ed. 2010).

²⁴ *Universal Camera*, *supra* note 22, 340 U.S. at 490. The Board's factual findings are to be upheld if supported by "substantial evidence on the record considered as a whole." NLRA § 10(f), 29 U.S.C. § 160(f); *Universal Camera*, *supra* note 22, 340 U.S. at 478-79, 488. See also NLRA § 10(e), 29 U.S.C. §§ 160(e). Like other agencies, the Board is permitted to change its mind and overrule prior determinations although such changes of position must be explained and reflect a reasonably defensible interpretation of the Act. See, e.g., *NLRB v. Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers*, 434 U.S. 335, 351 (1978).

Board, “they are not to abdicate the conventional judicial function” and “Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds.”²⁵

The Board’s authority is most narrow when it comes to changing the NLRA’s scope and altering the balance established by Congress as reflected in the Act’s provisions. Again to quote the Supreme Court, federal labor policy does not permit the Board to create a “standard of properly ‘balanced’ bargaining power”²⁶ nor does it “contain a charter for the [NLRB] to act at large in equalizing disparities of bargaining power between employer and union.”²⁷

Selected Board Decisions – Changing the Balance

Recent Board decisions raise questions concerning the legislative policy choices built into the NLRA that I have just mentioned – *i.e.*, the balancing of interests (between employers, unions, employees and the public), the impact on the economy, labor relations stability, and the protection of neutrals. I will briefly discuss three lines of cases.

1. *Exposing Neutrals to Labor Disputes – Banners as Non-Picketing and Non-Coercion.* First, in a series of “banner” decisions (including one handed down last week), the Board has concluded that, when multiple union supporters hold or stand beside 20-foot long banners directed at neutral companies, it is not coercion or picketing.²⁸

To appreciate the importance of these cases, one must understand that legality of union activity against neutrals can depend almost completely on how it is characterized, because the Act prohibits some types of secondary activities and protects others. The Act makes it *unlawful* if a union takes action to “threaten, coerce, or restrain” a neutral employer (or induce a “strike” or “refusal to handle” by the neutral’s employees). Picketing is a classic example – but not the

²⁵ *Universal Camera*, *supra* note 22, 340 U.S. at 490. See also *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 318 (1965) (court denies enforcement to NLRB determination where the Board’s view was “fundamentally inconsistent with the structure of the Act and the function of the sections relied upon”); *NLRB v. Sheet Metal Workers’ Int’l Ass’n, Local Union No. 19*, 154 F.3d 137, 141 (3d Cir. 1998) (Board decision afforded “limited deference” concerning common law agency principles as to which the NLRB “has no special expertise” and concerning § 2(13) of the Act, 29 U.S.C. § 152(13), where “Congress did not delegate to the Board the power to interpret that section”) (citations omitted); *NLRB v. Fin. Inst. Employees*, 475 U.S. 192, 202 (1986) (“Deference to the Board ‘cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption . . . of major policy decisions properly made by Congress’”) (citation omitted). Prior to enactment of the Taft-Hartley Act amendments, greater deference was afforded to NLRB decisions by the courts, which generated significant controversy and prompted Congress to modify the Act’s treatment of court review. See *Universal Camera*, *supra* note 22, 340 U.S. at 478-79.

²⁶ *NLRB v. Ins. Agents’ Int’l Union*, 361 U.S. 477, 497 (1960).

²⁷ *Id.* at 490.

²⁸ See *Carpenters Local 1506 (Eliason & Knuth of Arizona, Inc.)*, 355 NLRB No. 159 (Aug. 27, 2010); *Carpenters Local 1506 (Marriott Warner Center Woodland Hills)*, 355 NLRB No. 219 (Sept. 30, 2010); *Southwest Regional Council of Carpenters (Richie’s Installations, Inc.)*, 355 NLRB No. 227 (Oct. 7, 2010); *Southwest Regional Council of Carpenters (New Star Gen. Contr. Inc.)*, 356 NLRB No. 88 (Feb. 3, 2011). Each of these cases were decided by a majority or plurality of Board members, with dissenting opinions by Members Schaumber and/or Hayes. See note 35, *infra*.

only example – of potential coercion, threats and restraint against neutrals that the Act prohibits.²⁹

By deciding that large banners do *not* constitute picketing (or threats, coercion or restraint), this effectively eliminates the Act’s secondary boycott protection for neutrals if unions have people holding enormous stationary banners, even though it would violate the Act when the same number of people walk while carrying smaller signs within the same area.

Several additional points about the Board’s recent banner decisions warrant particular attention:

- *Size of banners.* These cases involve banners that are “3 or 4 feet high and from 15 to 20 feet long,” requiring up to 5 people to hold them,³⁰ and the banners identify the neutral company by name using words like “Shame,” “Labor Dispute” and “Immigrant Labor Abuse,” without indicating the union’s dispute is actually with someone else.³¹

²⁹ Union conduct has been deemed unlawful secondary coercion even in the absence of conventional picketing. See, e.g., *UFCW Local 1776 (Carpenters Health & Welfare Fund)*, 327 NLRB 593 (1999), citing *Iron Workers Local 433 v. NLRB*, 598 F.2d 1154, 1158 n.6 (9th Cir. 1979) (union representative stationed at neutral gate wearing “observer” sign held to constitute coercion in the form of “signal picketing,” defined as “activity short of a true picket line that acts as a signal to neutrals that sympathetic action on their part is desired by the union”). As explained in the dissenting opinion by Members Schaumber and Hayes in *Eliason & Knuth*, *supra* note 28, “The prohibition against coercive secondary activity sweeps more broadly and has been held to encompass patrolling without signs, placing picket signs in a snowbank and then watching them from a parked car, visibly posting union agents near signs affixed to poles and trees in front of an employer’s premises, posting banners on a fence or stake in the back of a truck with union agents standing nearby and . . . simply posting agents without signs at the entrance to a neutral’s facility.” 355 NLRB No. 159, slip op. at 19 (footnotes omitted) (Members Schaumber and Hayes, dissenting), citing *Service Employees Local 399 (Burns Detective Agency)*, 136 NLRB 431, 436–437 (1962); *NLRB v. Teamsters Local 182 (Woodward Motors)*, 314 F.2d 53 (2d Cir. 1963), enforcing 135 NLRB 851 (1962); *NLRB v. United Furniture Workers*, 337 F.2d 936, 940 (2d Cir. 1964); *Mine Workers Local 1329 (Alpine Construction)*, 276 NLRB 415, 431 (1985), remanded on other grounds, 812 F.2d 741 (D.C. Cir. 1987); *Mine Workers District 2 (Jeddo Coal Co.)*, 334 NLRB 677, 686 (2001). Cf. *Lawrence Typographical Union No. 570 (Kansas Color Press)*, 169 NLRB 279, 283 (1968), enforced, 402 F.2d 452 (10th Cir. 1968) (“the Board and the courts have held that patrolling, in the common parlance of movement, and the carrying of placards, are not a *sine qua non* of picketing”) (citations omitted).

³⁰ *Eliason & Knuth*, *supra* note 28, slip op. at 2-3, 26-27 (3 or 4 people holding banners). In some instances, the banners were 4 feet by 18 feet long, framed on the top and sides, with base legs which allowed them to stand by themselves, accompanied by multiple union members or employees. See, e.g., *Marriott Warner*, *supra* note 28, slip op. at 4 (ALJ opinion). Up to 5 people were holding or standing by the banners in *New Star Gen. Contractors Inc.*, *supra* note 28, slip op. at 12-13 (ALJ opinion). See also *Richie’s Installations, Inc.*, *supra* note 28, slip op. at 3-5 (ALJ opinion).

³¹ *Eliason & Knuth*, *supra* note 28, slip op. at 2-3; *Marriott Warner*, *supra* note 28, slip op. at 4 (ALJ opinion); *Richie’s Installations, Inc.*, *supra* note 28, slip op. at 3-5 (ALJ opinion); *New Star Gen. Contractors Inc.*, *supra* note 28, slip op. at 12-13 (ALJ opinion).

In 1959, while strengthening the Act’s secondary boycott prohibitions, Congress added a “publicity proviso” to Section 8(b)(4) which protects “publicity, other than picketing” for the purpose of truthfully advising the public of a union’s primary dispute. 29 U.S.C. § 158(b)(4). The Supreme Court has explained this permits conduct which, if restricted, could run afoul of the free speech guarantees afforded by the First Amendment. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568 (1988). Cases addressing the “publicity, other than picketing” language, however, have most often interpreted the phrase as relating primarily to the distribution of leaflets. See, e.g., *DeBartolo*, 485 U.S. at 570-71, 578. When evaluating free speech issues, the Supreme Court has distinguished leafletting from picketing, with picketing being defined as “a mixture of conduct and communication,” where the conduct element “often provides the most persuasive deterrent to third persons about the enter a business

- *Banners are equally or more coercive than conventional pickets.* In these cases, the people holding banners do not engage in back-and-forth walking. However, what the Act prohibits are secondary union actions which “threaten, coerce, or restrain” neutrals.³² It appears clear that a 4 foot high banner 20 feet long with large lettering being held by 3 or 4 stationary people is coercive to the same (or a greater) degree as 3 or 4 people holding smaller signs with smaller lettering who walk within the same area.³³
- *Number of affected neutrals.* A large number of neutral parties – including small businesses – may be affected by the majority reasoning in the banner cases. Just taking four of the Board’s recent banner cases, the union activity affected at least *two dozen* neutral companies, in addition to their own employees, customers, vendors and the public.³⁴
- *Dissenting opinions.* In these banner cases, there are dissenting opinions by former Member Schaumber and/or current Member Hayes.³⁵ I refer the Subcommittee to those opinions for a more detailed discussion of relevant issues.

2. *Expanding “Pre-Hire” Bargaining.* In another decision, *Dana Corp. (UAW)*,³⁶ a two-member plurality of the Board – with Member Hayes, dissenting³⁷ – upheld the legality of a written agreement between Dana Corporation and the United Auto Workers (UAW) which laid

establishment.” *DeBartolo*, 485 U.S. at 580, quoting *Safeco*, supra note 11, 447 U.S. at 619 (Justice Stevens, concurring); and citing *Babbitt v. Farm Workers*, 442 U.S. 289, 311 n.17 (1979); *Hughes v. Superior Court*, 339 U.S. 460, 465 (1950). The Board majority in *Eliason & Knuth* relied, in part, on the Ninth Circuit decision in *Overstreet v. Carpenters Local 1506*, 409 F.3d 1199 (9th Cir. 2005), where the court declined to issue an injunction against banners and leafleting under NLRA § 10(l), 29 U.S.C. § 160(l), based on “First Amendment concerns” (*id.* at 1219), although the court indicated that the Board was not entitled to deference as to any First Amendment issue because “constitutional decisions are not the province of the NLRB. . . .” *Id.*

³² Union conduct has constituted unlawful coercion under § 8(b)(4)(B) in the absence of patrolling and/or conventional picketing. See note 29, supra.

³³ As indicated in note 30, supra, up to 5 union supporters were holding or standing by the banners in *New Star Gen. Contr. Inc.*, supra note 28, slip op. at 12-13 (ALJ opinion). Conventional secondary picketing has been declared unlawful under § 8(b)(4)(B) based on picketing by as few as one person. See, e.g., *IBEW v. NLRB*, 341 U.S. 694, 696-67 (1951) (1 picket). See also *Iron Workers Local 433 (Aram Kazazian Constr., Inc.)*, 293 NLRB 621 (1989) (2 pickets); *Laborers’ Eastern Region Organizing Fund (Ranches at Mt. Sinai)*, 346 NLRB 1251,1253 (2006) (“no minimum number of persons is necessary to create a picket line”). Cf. *United Bhd. of Carpenters (Wadsworth Bldg. Co.)*, 81 NLRB 802, 812 (1949), enforced, 184 F.2d 60 (10th Cir. 1950), cert. denied, 341 U.S. 947 (1951): “It was the objective of the unions’ secondary activities, as legislative history shows, and not the quality of the means employed to accomplish that objective, which was the dominant factor motivating Congress” (emphasis in original).

³⁴ *Eliason & Knuth*, supra note 28, slip op. at 26-27; *Marriott Warner*, supra note 28, slip op. at 3-10 (ALJ opinion); *Richie’s Installations, Inc.*, supra note 28, slip op. at 2-5 (ALJ opinion); *New Star Gen. Contr. Inc.*, supra note 28, slip op. at 11-12, 15-23 (ALJ opinion). The affected neutrals included medical centers and hospitals, restaurants, a hotel, car dealership, spa, consulting company, newspaper publisher, mortgage lender, retail furniture store, medical device manufacturer, property management company, public transit authority, real estate developers, agents and brokers, a credit union, a pharmaceutical company, two universities, and a public courthouse. *Id.*

³⁵ See *Eliason & Knuth*, supra note 28, slip op. at 15 (Members Schaumber and Hayes, dissenting); *Marriott Warner*, supra note 28, slip op. at 2 (Member Hayes, dissenting); *Richie’s Installations, Inc.*, supra note 28, slip op. at 2 (Member Hayes, dissenting); *New Star Gen. Contr. Inc.*, supra note 28, slip op. at 7 (Member Hayes, dissenting).

³⁶ 356 NLRB No. 49 (Dec. 6, 2010).

³⁷ *Id.*, slip op. at 10 (Member Hayes, dissenting).

out employment terms for *unrepresented* employees at *nonunion* Dana facilities, where most of the terms would take effect after the union received future card-check recognition. The Dana agreement provided for union access to the nonunion facilities, company neutrality, and recognition after the union attained a card-check majority.³⁸ The agreement's other commitments set parameters around premium sharing, deductibles, out-of-pocket maximums, and dispute resolution (specifically, after the union was recognized, an arbitrator would decide what would be in the parties' next contract if the company and union failed to agree on that contract by themselves).³⁹

Arguments can be made for and against these types of arrangements.⁴⁰ However, Congress considered the legality of non-majority and pre-hire agreements in Section 8(f) of the Act, which permits these types of non-majority agreements, but only in the construction industry.⁴¹ For this reason, and because the Act places such importance on the right of employees to decide whether or not to participate in collective bargaining,⁴² this is another area where policy changes should originate in Congress.

3. *Other Board Cases.* Finally, recent Board decisions include *New York University*,⁴³ where a two-member plurality reinstated a representation petition covering college graduate assistants. The Board plurality – with Member Hayes in dissent⁴⁴ – overturned the Regional Director's dismissal of the union petition. Again, this lays the foundation for changing existing law and expanding the Act's coverage.⁴⁵

³⁸ *Id.* at 2.

³⁹ *Id.* The Board's *Dana/UAW* decision departs from case law that had been in effect for more than 40 years. *Majestic Weaving Co.*, 147 NLRB 859 (1964), *enforcement denied*, 355 F.2d 854 (2d Cir. 1966). *Cf. ILGWU v. NLRB (Bernhard-Altman)*, 366 U.S. 731 (1961).

⁴⁰ In sale situations, for example, there may be a desire to have greater certainty because the law regarding successorship has become so difficult to understand. *See, e.g., Howard Johnson Co. v. Detroit Local Joint Executive Board*, 417 U.S. 249, 263 n.9 (1974) (Supreme Court, after issuing several successorship decisions, states the term "successorship" is "simply not meaningful in the abstract" and a new employer "may be a successor for some purposes and not for others"). I have written that such complexity, by itself, undermines the stability that Congress hoped to foster when adopting the Act. Herbert R. Northrup & Philip A. Miscimarra, *GOVERNMENT PROTECTION OF EMPLOYEES INVOLVED IN MERGERS AND ACQUISITIONS* at 346 (1989) (Congress "could hardly have envisioned the massive array of complex legal principles that are now imbued in the term 'successorship'").

⁴¹ NLRA § 8(f), 29 U.S.C. § 158(f) (permitting pre-hire agreements only where the employer is "engaged primarily in the building and construction industry"). Experience under § 8(f) has shown that other issues can require attention when negotiations and agreements set employment terms for employees where there is no employee majority favoring union representation. *See, e.g., John Deklewa & Sons*, 282 NLRB 1375 (1987), *enforced sub nom. Int'l Ass'n of Bridge, Structural & Ornamental Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988), *cert. denied*, 488 U.S. 889 (1988); *Laborers Local 1184 (NVE Constructors)*, 296 NLRB 1325 (1989).

⁴² NLRA § 9(a), 29 U.S.C. § 159(a).

⁴³ 356 NLRB No. 7 (Oct. 25, 2010).

⁴⁴ *Id.*, slip op. at 2 (Member Hayes, dissenting).

⁴⁵ The Regional Director's dismissal of the union petition was based on a prior Board decision, *Brown University*, 342 NLRB 483 (2004), which held graduate assistants providing teaching and research services are not employees under the Act. In its recent *New York University* ruling, the Board plurality stated there were "compelling reasons" for reconsidering *Brown University*, but the plurality remanded the case so relevant issues could be addressed "based on a full evidentiary record." *Id.*, slip op. at 2.

There are other important Board decisions and developments in addition to those I have mentioned.⁴⁶ I have limited my comments to the authority of the NLRB, but I note that the Board's Acting General Counsel in recent months has also announced a variety of new enforcement initiatives.⁴⁷

Conclusion

I will close by quoting a statement made by the Supreme Court more than 50 years ago, which remains relevant today:

It is suggested here that the time has come for a reevaluation of the basic content of collective bargaining as contemplated by the federal legislation. *But that is for Congress. Congress has demonstrated its capacity to adjust the Nation's labor legislation to what, in its legislative judgment, constitutes the statutory pattern appropriate to the developing state of labor relations in the country. . . . [W]e do not see how the Board can do so on its own.*⁴⁸

This concludes my prepared testimony. I have provided an extended version of my remarks for the record. I look forward to any questions Members of the Subcommittee may

⁴⁶ The NLRB in an array of pending cases, each involving important issues, has issued public notices and invitations to file briefs, and the Board is also engaging in rulemaking as described below, raising the possibility that these may lead to further changes in position by the Board:

- *Rite Aid Store #6473*, Case 31-RD-1578 (notice issued Aug. 31, 2010), involving potential reconsideration of *Dana Corp.*, 351 NLRB 434 (2007) where Board held that voluntary recognition bars representation or decertification petition for a reasonable time only if written notice advises employees of their right to file or support such a petition within 45 days after posting of notice;
- *UGL-UNICCO Service Co.*, Case 1-RC-22447 (notice issued Aug. 31, 2010), involving potential reconsideration of *MV Transportation*, 337 NLRB 770 (2002) where Board held a successor employer's union recognition will not bar an otherwise valid petition or other challenge to the union's majority status, and possible return to contrary rule set forth in *St. Elizabeth Manor, Inc.*, 329 NLRB 341 (1999);
- *Roundy's Inc.*, Case 30-CA-17185 (notice issued Nov. 12, 2010), involving denial of union access to private property, and potential reconsideration of *Register-Guard*, 351 NLRB 1110 (2007) where Board (in context of e-mail) permitted distinctions regarding access so long as the employer did not discriminate between union access and other activities of a similar character, and *Sandusky Mall Co.*, 329 NLRB 618 (1999), where Board held employers could not lawfully deny access to non-employee union supporters while permitting charitable solicitations on private property;
- *Specialty Healthcare and Rehabilitation Center of Mobile*, Case 15-RC-8773 (notice issued Dec. 22, 2010), involving potential reconsideration of *Park Manor Care Center*, 305 NLRB 872 (1991), where Board held that bargaining units in non-acute healthcare facilities would be based on the "pragmatic" or "empirical" community-of-interests test and not the Board's rules regarding acute care bargaining units;
- *Proposed Rules Regarding Notice-Posting*, 75 Fed. Reg. 80410 (published Dec. 22, 2010), involving potential notice-posting requirement regarding employee rights under the NLRA and the potential distribution of such notices "electronically" if the employer "customarily communicates with its employees by such means." *Id.* at 80413.

⁴⁷ See, e.g., GC Mem. 10-07 (Sept. 30, 2010) (§ 10(j) injunctions in union organizing); GC Mem. 11-01 (Dec. 20, 2010) (hallmark violation remedies in union organizing); GC Mem. 11-04 (Jan. 12, 2011) (default language in settlement agreements); GC Mem. 11-05 (Jan. 20, 2011) (deferral to arbitration under §§ 8(a)(1) and (3)); *Am. Med. Response of Conn., Inc.*, Case 34-CA-12576 (complaint involving internet posting policies and Facebook comments; settlement announced Feb. 7, 2011).

⁴⁸ *NLRB v. Insur. Agents, supra* note 26, 361 U.S. at 500 (emphasis added; footnote omitted).

have. Thank you for the invitation to appear today, and for the Subcommittee's attention to our national labor and employment policy.

PHILIP A. MISCIMARRA
CENTER FOR HUMAN RESOURCES
THE WHARTON SCHOOL
UNIVERSITY OF PENNSYLVANIA
3620 Locust Walk
Philadelphia, PA 19104-6302
215-898-5605
miscimarra@wharton.upenn.edu

MORGAN LEWIS & BOCKIUS LLP
77 West Wacker Drive, 5th Floor
Chicago, IL 60601
312-324-1165
pmiscimarra@morganlewis.com